(19) (20)

HIGH COURT OF CHHATTISGARH AT BILASPUR

Criminal Appeal No. 969/2001

APPELLANT Rajendra Rajwar

VERSUS

RESPONDENT The State of Chhattisgarh

Judgment for consideration

Sd/-
DHIRENDRA MISHRA
Judge

Hon'ble Shri Justice L.C. Bhadoo

Sd/-
L.C. BHADOO
Judge

Judgment post for 02-5-2007

Sd/-
Dhirendra Mishra
Judge

(20) (21)

HIGH COURT OF CHHATTISGARH AT BILASPUR
Criminal Appeal No. 969/2001

APPELLANT Rajendra Rajwar, S/o. Sumar Sai, aged about 32 years, Occupation-Agriculturist, R/o. village Dumaria, Police Station-Patna, Distt. Korea (C.G.)

RESPONDENT The State of Chhattisgarh, through Police Station Ramanuj Nagar, Distt. Surguja (C.G.)

DB : Hon'ble Shri Justice L.C.Bhadoo &
Hon'ble Shri Justice Dhirendra Mishra, JJ

Shri Ashok Kumar Shukla, Counsel for the appellant.
Shri Akhil Mishra, Panel Lawyer, for the State/respondent.

J U D G M E N T

Per Dhirendra Mishra, J

This Criminal Appeal under Section 374(2) of the Code of Criminal Procedure is directed against the judgment of conviction and order of sentence dated 27.08.2001 passed in S.T. No. 330/2000 by 5th Additional Sessions Judge, Surajpur (FTC) whereby learned trial Court after holding the appellant guilty of causing death of his wife namely Suntibai, has convicted him under Section 302 of IPC and sentenced him to undergo imprisonment for life.

2. The case of the prosecution as unfolded from the F.I.R. of Ex. P-7 lodged by the Station House Officer, Police Station Ramanujnagar on 19.06.2000 is that the appellant, husband of the deceased had illicit relationship with other woman and with intention to eliminate the deceased, he handed over her three Sulphas tablets on the eve of Ganga Dashahara when she was going to her parental home and advised her to consume all the three tablets together after taking some breakfast. The deceased came to her parents' village Kailashpur and took one tablet after breakfast on 16.06.2000 and immediately started vomiting. She was brought to the hospital at about 22.00 hrs. on the same day, where she was declared dead by the doctor and thus with intention to murder, the appellant gave the deceased the

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tablets in accordance with his plan, as a result of which, Suntibai died. Initially Merg intimation of Ex. P-5 was given by P.W.-5 Shiv Prasad, father of the deceased on 17.06.2000 at about 9.00 hrs. Inquest over the body of Suntibai was prepared vide Ex.P-2 in presence of the witnesses. Site plan of Ex. P-3 was prepared. Two tablets tied in polythene on being produced by P.W.-5 Shiv Prasad were taken into possession vide Ex.P-4. Spot map was got prepared by Halka Patwari vide Ex.P-5. The body of Suntibai was sent for autopsy to Community Health Centre, Ramanujnagar vide Ex.P-6 where Dr. D.K.Vishwakarma (P.W.-4) conducted post mortem and prepared post mortem report and observed that eyes closed, pupil's diluted face, congested cyanosed lip and fingers and toes, rest of body was healthy. The doctor opined that the cause of death is asphyxia due to paralysis of respiratory muscles and failure of respiratory centre due to toxins, duration of death is 12 to 18 hrs. Two tablets sent by the police along with the dead body were also examined by the doctor and he opined that it may be Sulpher (Aluminum Phosphide). Viscera preserved by the doctor after post mortem examination was taken into possession vide Ex.P-9. The tablets and viscera were sent to Forensic Science Laboratory, Sagar for examination vide Ex.P-10. After completion of Investigation, charge sheet was filed in the Court of Additional Chief Judicial Magistrate, Surajpur who in turn committed the case to the Court of Sessions Judge, Ambikapur from where the learned Additional Sessions Judge received the case on transfer for trial.

3. Learned trial Court framed charge under Section 302 of the IPC against the accused, who abjured his guilt. Prosecution in order to establish the charge against the accused appellant, examined 8 witnesses. Thereafter statement of accused was recorded under Section 313 of the Cr.P.C. in which he denied the circumstances appearing against him in prosecution evidence and pleaded innocence and false implication. The appellant examined four defence witnesses in support of his defence.

4. Learned Additional Sessions Judge after hearing the counsel for the respective parties, convicted and sentenced the appellant as above.

5. Learned trial Court on the basis of statement of P.W.-7 Ku. Shanti as also P.W.-4 Dr. D.K.Vishwakarma who has performed post mortem and opined that cause of death was poisoning and further on the basis of chemical examination report of two tablets that they contained Aluminum Phosphide used for killing insecticides, it has been held that the death was homicidal. After going through the complete record of the trial Court, we found that the report of the chemical examiner has not been proved though the same is available on record received from the trial Court.

6. Conviction is based on statement of P.W.-7 Shanti, 8 years' old child witness and daughter of the deceased who has stated that her mother died due to consuming tablet. The tablet was given to her by her father by which she died. The tablet was given at the time of death by her father but when her mother was at Kailashpur, her mother consumed the tablet on next day in her maternal house. Her mother after consuming tablet started vomiting and she died on the same day while she was taken to hospital Shrinagar. She has also stated that when her mother was taking food, her father gave her three tablets and asked her to take it after reaching to *Maika* as her mother used to suffer from body ache. Her father used to beat her mother and they used to quarrel. He at once after drinking chased her with battle-axe and at times, he had also tried to throw her in the well. The dispute between them was that her father was entangled with a lady namely Khochari, resident of village Tendua. She has also stated that her mother objected to this conduct of her father, on which he had also tried to set her ablaze after pouring kerosene. She has further stated that she had gone along with her mother to her maternal home to see Ganga Dassehara and to meet her parents. She has also stated that when her mother started vomiting, she narrated the above fact to her maternal grand mother and maternal grand father. In the cross examination she has admitted that she is residing

with her maternal grand father and maternal grand mother, whereas her younger brother and sister are residing with grand father and grand mother. She has stated that she herself refused to go to the house of her grand father and grand mother. She has admitted that Noharmania is name of her maternal grand mother who is step mother of her mother and she had come to the Court 7-8 times with her maternal grand mother for giving evidence. P.W.-5 Shiv Prasad is father of deceased who has also stated that he had married his daughter to the appellant 16 years back. There was recurring dispute and quarrel between Rajendra and his daughter in relation to a girl and this fact was disclosed to him by his daughter Suntibai. He has further stated that deceased Suntibai had come to village Deonagar to celebrate Ganga Dassahara after seeking permission from her husband along with her three children. On the date of incident, he had gone to the field and he returned from the field at 2-3 O'clock and found his daughter unconscious. She was vomiting. When he asked his grand daughter, she told him that her mother has consumed tablet. She also told that the tablets were given by her father who had asked to take the tablet after breakfast and she further said that her mother had consumed only one tablet and remaining two tablets she had shown to him. His daughter died on way while being taken to hospital and thereafter he lodged Merg intimation of Ex.P-5. He has denied the suggestion that his daughter had come without seeking permission from the appellant when he had gone to the field. He has further denied the suggestion that she consumed the tablet as he and his wife reprimanded her for coming to their home. P.W.-1 Gopal Ram and P.W.-5 Mangalsai have also stated that grand daughter of Shiv Prasad had told that her father had given three tablets to her mother and counseled her to take the tablets as she was suffering from backache, however in the cross examination, witness Gopal Ram has stated that he cannot say why this fact is not mentioned in his statement of Ex.D-1 as he told this fact to police during interrogation. In the statement of Ex.D-2 of Mangal Sai, the above fact is missing. The accused has examined his 5 years' old son Vidhan as his defence witness. After preliminary examination, learned trial Court has recorded that the witness is

capable of partially understanding the questions and replying. This witness has stated that he along with his mother and two sisters had gone to see Ganga Dashahara from where they went to house of their maternal grand mother. There her mother complained stomachache. His grand mother reprimanded her for frequently coming to her house. When she was eating, his grand mother started quarrelling and turned her out. He was advised by his grand mother to say that his Dau has given the tablet. He has further stated that his sister was tutored by his *Naani* to say that his father had given tablet. She had consumed tablet given by maternal grand mother. His father and mother lived peacefully. On cross examination he has stated that he had departed from his house during night. He had come to Surajpur by motor and reached at about 8.00 a.m. He has further stated that his sister was tutored. He himself is son. He had come with grand mother, Laxman, Panna and Vijay. He wants to save his father. He has categorically denied that he is speaking all this as he has been tutored and has admitted that he is residing with his grand father.

7. If we sum up the oral and documentary evidence available on record, we find that the deceased along with P.W.-7 Shanti, D.W.-1 Vidhan and another daughter went to celebrate Ganga Dashahara at village Deonagar and from there they reached Kailashpur, their maternal home. On 16.06.2000 in the morning, she took the tablet (Sulphas) after some breakfast and started vomiting. She was taken to hospital, however she died on way. Merg intimation was given by her father Shiv Prasad on 17.06.2000 at 9.00 O'clock informing that Sunti came to his house along with three children on 15.06.2000. On 16.06.2000 she consumed one tablet after breakfast and started vomiting and became unconscious. They took her to Ramanujnagar hospital where the doctor declared her dead, thereafter he gave merg intimation. The body was sent for post mortem on 17.06.2000 to Primary Health Centre, Ramanujnagar along with two tablets. Post mortem report of Ex.P-6 is dated 17.06.2000. Crime was registered on 19.06.2000 under Section 328 and 302 of IPC. Report of chemical examiner though not tendered in the evidence, mentions presence of Aluminium Phospide insecticide in pieces of viscera and two tablets.

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8. It is not in dispute that diary statement of P.W.-7 Shanti daughter of the deceased was recorded only on 19.06.2000 and she was residing with her maternal grand father and maternal grand mother at village Kailashpur whereas the defence witness No.1 Vidhan aged 5 years, son of the deceased and the appellant was residing at the time of his deposition with his grand father and grand mother, therefore, possibility of tutoring of both these witnesses cannot be ruled out.

9. From the statement of Shiv Prasad, it is evident that as soon as he returned from the field and saw his daughter vomiting and unconscious, he was apprised by his grand daughter P.W.-7 Shanti that his daughter has consumed tablet given by her father and he was also given two remaining tablets given by the appellant and two tablets were in turn seized by the police vide seizure memo of Ex.P-4 on 17.06.2000. However the fact that the tablet which was consumed by the deceased and the other two tablets were given by the appellant to the deceased with the advise to consume the same together after reaching maternal home and after taking morning breakfast is conspicuously missing from Merg Intimation Ex.P-5. It is unconceivable that had the father known that the tablet which was responsible for the death of his daughter was handed over to her by the appellant, he would not have mentioned the same in the merg intimation and this fact would have disclosed only on 19.06.2000 i.e. after 48 hours for the first time. Omission of this fact in merg intimation, itself creates serious doubts about the assertion of P.W.-7 Shanti that the tablets were in fact given by her father to her mother. Merg intimation also does not mention that the appellant and the deceased were in strained relation because of illicit relation of appellant with some 3rd woman.

10. We have scrutinized the inquest report as also memorandum sent along with dead body to the doctor for post mortem, which was prepared in presence of Shiv Prasad, father of the deceased. The fact that she died after consuming tablet finds place, however there is no

mention that the appellant gave three tablets to the deceased with advice to consume the same in the morning after breakfast. Similarly, in the request for post mortem also, the above fact is missing.

11. Learned trial Court has brushed aside the statement of D.W.1 Vidhan who is his own son with an observation that he has feared badly in court and is not at all reliable and further observed that Shanti though 8 years old but she is real daughter of the accused, and therefore, there is no reason for her to speak lie against her own father and thus holding her evidence fully reliable has held the appellant guilty, however, we are of the opinion that the manner in which the 8 years old girl has deposed before the trial Court particularly about the fact that the appellant had illicit relation with some other lady of the village and account given by her about the other incident of past in such a detail, the possibility that her deposition is a result of tutoring cannot be ruled out particularly when she has admitted that she is residing with maternal grand mother and maternal grand father. The Hon'ble Apex Court in the matter of **Arbind Singh –v- State of Bihar** reported in 1995 Supp. (4) SCC 416 has held that:-

> "Child witness is prone to tutoring and hence court should look for corroboration particularly when the evidence betrays traces of tutoring."

In the matter of **Panchhi and others –v- State of U.P.** reported in AIR 1998 SC 2726, the Hon'ble Apex Court has held that :-

> "It cannot be said that the evidence of a child witness would always stand irretrievably stigmatized. It is not the law that if a witness is a child his evidence shall be rejected, even if it is found reliable. The law is that evidence of a child witness must be evaluated more carefully and with greater circumspection because a child is susceptible to be swayed by what others tell them and thus a child witness is an easy pray to tutoring."

12. One more thing is notable that the prosecution for the reasons best known to it, has not examined Noharmania, step mother of the deceased who was admittedly present at the time of incident and who in fact saw the deceased vomiting after poisoning apart from P.W. 7. Thus the prosecution has deliberately withheld the material witness

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who was accompanying P.W. 7 to the Court on several occasions as admitted by Shanti (P.W. 7)

13. On the basis of aforesaid analysis, we are of the considered opinion that statement of P.W. 7 Shanti does not inspire confidence for the reasons mentioned in the foregoing paragraphs and the Court below was not justified in basing conviction of the appellant on the statement of this witness who is admittedly 8 years old child particularly in the circumstances when poison was consumed in her maternal home.

14. In the result, the appeal is allowed. Conviction of the appellant and sentence imposed upon him by the trial Court is set aside. He is acquitted of the charge punishable under Section 302 of I.P.C. It is stated that the appellant is in jail since 19-6-2000. He be set at liberty forthwith, if not required in any other case.

Sd/-
L.C. BHADOO
Judge

Sd/-
Dhirendra Mishra
Judge